

STATE OF MICHIGAN
COURT OF APPEALS

JANELLE KOVAL and JEROME KOVAL,

Plaintiffs-Appellants,

v

CONTINENTAL INSURANCE COMPANY,

Garnishee Defendant-Appellee,

and

STEVEN J. TRAUTNER and LORI TRAUTNER,

Defendants.

UNPUBLISHED

August 17, 2004

No. 246645

Muskegon Circuit Court

LC No. 01-041116-NO

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's grant of summary disposition to garnishee defendant Continental Insurance Company (Continental) on the basis that the insurance policy Continental issued to defendants Trautner did not provide coverage for plaintiffs' claims. Plaintiffs also appeal the court's denial of their motion to amend garnishment proceedings to include claims of bad faith. We affirm in part and reverse in part.

I

This appeal arises from a garnishment proceeding in which plaintiffs Koval sought to recover the amount of a judgment entered in their favor against defendants Trautner.

In 1998, plaintiffs Koval entered into a land contract with their daughter, Lori Trautner, and her husband, Steven Trautner, for the sale of the Koval home in Muskegon. Plaintiffs Koval had lived in the home for twenty-four years before selling it to defendants Trautner. Under the land contract, defendants were obligated to purchase insurance to protect the Koval's interest. Defendants' application for homeowners insurance set forth under "Additional Interest" the Kovals' name and address, and identified the Kovals as land contract holders having an ownership in the property. The insurance policy Continental issued defendants Trautner identified the Kovals as "Additional Insured." The policy was renewed annually and was in effect on August 5, 2000, when plaintiff Janelle Koval sustained serious injuries after falling

down stairs the Trautners had constructed on the premises after they obtained possession from the Kovals.

Plaintiffs Koval brought a premises liability claim against the Trautners, who then reported the claim to Continental. By letter dated June 18, 2001, a Continental claims representative notified plaintiffs and the Trautners that Janelle Koval's claim for bodily injury "is expressly denied," and that "[n]o coverage for a legal defense or indemnification for the potential legal responsibility of Steven J. or Lori Trautner shall be extended with respect to the alleged occurrence on August 5, 2000." Continental's letter stated that under the policy, personal liability "does not apply to you or any family member," and "[t]he Policy definition of "you" includes the person named in the Coverage Summary as an Additional Insured for the HOME Segment with respect to Liability Coverage—Personal Liability and Liability Coverage—Medical Expense."

After Continental denied coverage, plaintiffs obtained a judgment against the Trautners for \$481,723.00, plus interest and costs. On March 6, 2002, plaintiffs filed a request and writ for garnishment against Continental, listing it as garnishee-defendant and alleging that Continental was contractually obligated to satisfy the judgment against the Trautners. Continental filed a Garnishee Disclosure stating it was not indebted the Trautners and that the insurance policy expressly excluded personal liability coverage for either a defense or indemnification of the Trautners.

The parties filed cross-motions for summary disposition. Plaintiffs also filed a motion to amend the garnishment proceedings to include claims of bad faith failure to settle, bad faith failure to defend, and to increase their claim from the policy limit to the full amount of the judgment, and for 12% interest under MCL 500.2006. Following a hearing on December 2, 2002, the court took the motion under advisement. At a later hearing on the cross-motions for summary disposition, the court denied plaintiffs' motions for partial summary disposition and to amend, and granted Continental summary disposition.

II

Plaintiffs challenge the circuit court's determination that Continental's policy did not provide coverage for their claims against the Trautners and its consequent grant of Continental's motion for summary disposition. Plaintiffs contend that the express terms of the amendment to the General Provisions expand the definition of "you" to include plaintiffs Koval, the Additional Insured, with respect to three specific areas, and that this expanded definition of "you" does not apply to exclusions contained in a different area, on which Continental relies to exclude coverage. We agree that this is a reasonable interpretation of the policy.

A

The circuit court's determination to grant summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Sprague v Farmers Ins Exchange*, 251 Mich App 260, 264; 650 NW2d 374 (2002). The construction and interpretation of an insurance contract is a preliminary question of law for a court to determine. *Allstate Ins Co v Muszynski*, 253 Mich App 138, 140; 655 NW2d 260 (2002). This Court reviews the circuit court's interpretation of the insurance contract de novo, interpreting the contract's terms in accordance with the principles of construction

governing other contracts. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). An insurer may define or limit the scope of coverage as long as the policy language leads to only one reasonable interpretation and does not contravene public policy. *Id.* at 568. Where there is no ambiguity, an insurance contract must be enforced as written. *Muszynski, supra* at 141. A policy is ambiguous if, after reading the entire contract, its language can reasonably be understood in different ways. *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). Ambiguities are to be construed against the drafter of the contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003); *Klapp, supra*, at 470-471, 474. Further, exclusionary clauses are to be strictly construed against the insurer. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996), overruled in part on other grds in *Wilkie, supra*; *Twichel v MIC General Ins Corp*, 251 Mich App 476, 488; 650 NW2d 428 (2002), rev'd on other grounds 469 Mich 524 (2004); *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). If an insurer intends to exclude coverage under certain circumstances, it should clearly state those circumstances in the section of its policy entitled "exclusions." *Fragner v American Community Mutual Ins Co*, 199 Mich App 537, 540; 502 NW2d 350 (1993).

B

The policy consists of several sections. (Emphases in all forms in the sections quoted herein are in the original unless otherwise stated.) The "INTRODUCTION" states in pertinent part:

COVERAGES YOU HAVE PURCHASED

Your policy consists of this "INTRODUCTION," the "GENERAL PROVISIONS" found at the end of your policy, and one or more Segments you have purchased. The "INTRODUCTION" and the "GENERAL PROVISIONS" contain information that applies to all the Segments you have purchased unless specifically noted otherwise. Each Segment contains other provisions that apply to that particular coverage.

The Introduction defines "You" and "your" as referring to the "Named Insured." It does not mention additional insureds.

An amendment to the General Provisions states:

2. The following provisions are added to the "GENERAL PROVISIONS":

* * *

b. ADDITIONAL INSURED

The definition of "you" and "your" includes the person or organization named in the Coverage Summary as an Additional Insured for the "HOME" Segment, with respect to:

(1) **Property Coverage – Real Property;**

(2) **Liability Coverage – Personal Liability**; and

(3) **Liability Coverage – Medical Expense**;

but only with respect to the premises associated with that “Additional Insured” in the Coverage Summary.

This coverage extension does not apply to ***bodily injury*** to an employee arising out of or in the course of the employee's employment by the person or organization.

The policy section entitled “**LIABILITY COVERAGE-HOME, PERSONAL LIABILITY-INSURING AGREEMENT**,” states in pertinent part:

If a claim or suit is brought against you or any ***covered person*** for the following:

1. ***Personal Injury***;
2. ***Bodily Injury***; or
3. ***Property Damage***,

caused by an ***occurrence*** to which this coverage applies, we will:

1. Pay on your behalf claims for which you or any ***covered person*** are legally liable . . . up to our limit of liability; except as excluded by the provisions listed in the **Liability Coverage – Losses We Do Not Cover**; . . .

* * *

Continental denied coverage under “**LOSSES WE DO NOT COVER**,” item 2g. That section provides:

LOSSES WE DO NOT COVER

* * *

2. **Personal Liability** does not apply to:

* * *

g. Bodily injury to you or any ***family member***. This exclusion also applies to any claim or suit brought against any **covered person**;

- (1) To repay; or
- (2) Share damages with;

another person who may be obligated to pay damages because of ***bodily injury*** to a ***covered person***.

C

The issue is whether the Trautners have coverage for this claim. The Trautners are the named insureds. They are granted coverage under Liability Coverage – Home, Personal Liability-Insuring Agreement unless coverage is excluded under Liability Coverage – Losses We Do Not Cover. Defendant asserts that coverage is excluded because the General Provisions amendment says that “you” includes the additional insured for the Home segment with respect to Liability Coverage-Personal Liability, and because that section extends only the coverage that is not excluded in Liability Coverage-Losses We Do Not Cover, the definition of “you” found in the General Provisions must also be applied to the Losses We Do Not Cover section.

The problem with this argument, however, is that this reading of the policy is not manifest from the language of the policy itself. If one works one’s way through the policy, the reading advanced by plaintiffs is equally reasonable.

As stated above, the Trautners, as the named insureds, have coverage unless coverage is excluded under Liability Coverage-Losses We Do Not Cover. That section states:

LOSSES WE DO NOT COVER

* * *

2. **Personal Liability** does not apply to:

* * *

g. Bodily injury to you or any ***family member***. . . .

Plaintiff does not fall within the policy’s definition of “family member” because she does not live in the household.¹ The question is whether she falls within the definition of “you.” The INTRODUCTION, which purports to apply to all sections of the policy unless otherwise indicated, defines “YOU” as the “named insured.” If this definition is applied, plaintiff, as an “additional insured” would not be included in the definition of “you,” and the exclusion would not apply. However, the INTRODUCTION also states that the GENERAL PROVISIONS contain information that applies to all the segments the insured has purchased unless specifically noted otherwise. One must look then to the amendment to the GENERAL PROVISIONS. The

¹ The DEFINITIONS section of the “HOME” segment of the policy states:

Family Member means a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child.

amendment states that the definition of “you” and “yours” is expanded to include an Additional Insured for the HOME segment with respect to three identified areas:²

(1) Property Coverage - Real Property;

(2) Liability Coverage - Personal Liability; and

(3) Liability Coverage - Medical Expense;

The first and the third areas are not at issue. The question is whether the reference in (2) to “Liability Coverage – Personal Liability” includes the section entitled “LOSSES WE DO NOT COVER.” One can take the position, as does defendant, that the expanded definition refers to personal liability coverage in general, and that the reference to “Liability Coverage - Losses We Do Not Cover” in the insuring section incorporates that section by reference. On the other hand, the contrary interpretation is at least as reasonable, based on the structure and explicit terms of the policy.

The policy is divided into sections and subsections, both in the body of the policy and also in the Table of Contents, which is included in the policy, below the header “*YOUR POLICY*,” between the INTRODUCTION and the DEFINITIONS. The coverage segment is entitled “HOME.” The Table of Contents for this segment follows the structure of the policy. The DEFINITIONS section comes first. The next section is entitled “PROPERTY COVERAGE – HOME.” Within that section are separate subsections organized under the headings “REAL PROPERTY,” “TANGIBLE PERSONAL PROPERTY,” “ADDITIONAL PROPERTY COVERAGES,” “LOSSES WE DO NOT COVER,” and “HOW WE SETTLE PROPERTY CLAIMS and WHAT YOU MUST DO.” Within each of these subsections, except the “LOSSES WE DO NOT COVER” subsection, there are additional sub-sections, e.g., “REAL PROPERTY-INSURING AGREEMENT,” “REAL PROPERTY-PROPERTY NOT COVERED,” “REAL PROPERTY-LIMIT OF LIABILITY,” and “REAL PROPERTY-COVERED PERILS.”

After the last subsection referring to Property Coverage, there is a new heading, introducing the next section, “LIABILITY COVERAGE –HOME.” This section is organized into the subsections “PERSONAL LIABILITY,” “MEDICAL EXPENSE,” “ADDITIONAL LIABILITY COVERAGES,” “LOSSES WE DO NOT COVER,” and “HOW WE SETTLE LIABILITY CLAIMS and WHAT YOU MUST DO.” The final section is entitled “GENERAL PROVISIONS – HOME.” The “PERSONAL LIABILITY” and “MEDICAL EXPENSE” sections each have two subsections: “PERSONAL LIABILITY-INSURING AGREEMENT” and “PERSONAL LIABILITY-LIMIT OF LIABILITY” and “MEDICAL EXPENSE-INSURING AGREEMENT” and “MEDICAL EXPENSE-LIMIT OF LIABILITY.”

² The policy does not characterize these areas by using the words “coverages” or “sections,” but simply says “with respect to” and lists the three areas.

Thus, in both the body of the policy, and the Table of Contents, which purports to be part of the policy, there are actual identifiable sections that correspond with the three areas enumerated in the amendment to the General Provisions, and the “LOSSES WE DO NOT COVER” section is not among them. In the “Property Coverage” section, there are four subsections that correspond to “Property Coverage – Real Property.” In the Liability Coverage section, there are two subsections that correspond to “Liability Coverage – Personal Liability,” and two subsections that correspond to “Liability Coverage – Medical Expense.” All other subsections, including the “Losses We Do Not Cover” subsections, are referred to as separate subsections within the “Property Coverage” and “Liability Coverage” sections.

If an insured were to seek to determine where the expanded definition of “you” is operable, it would be reasonable to conclude that the definition is operable in the four subsections of the “Property Coverage” entitled “Real Property,” in the two sections of the “Liability Coverage” entitled “Personal Liability,” and in the two sections of the “Liability Coverage” entitled “Medical Expense.” The amendment to the General Provisions does not include “Losses We Do Not Cover” as an area to which the expanded definition applies, although the policy very clearly treats these areas as separate subsections under the “Property Coverage” and “Liability Coverage” sections. Thus, on the face of the policy, the amendment does not purport to apply the expanded definition of “you” to these subsections.³

Defendant in effect argues, nevertheless, that because the insuring language, to which the expanded definition of “you” clearly applies, excludes liability excluded under “Liability Coverage – Losses We Do Not Cover,” the expanded definition of “you” must also be applied to that subsection as well. The policy, however, does not so state. To be sure, the “Losses We Do Not Cover” subsection qualifies the liability coverage granted to the additional insured as well as the insured, and both are subject to the exclusions in that section. It is a separate question, however, whether the word “you” as used in the “Losses We Do Not Cover” section is defined by the “INTRODUCTION” or the amendment to the “General Provisions.” Because the amendment to the General Provisions does not clearly state that it applies to the “Losses We Do Not Cover” subsection as well as the “Personal Liability” subsections, the policy is at best

³ This reading is further buttressed by the language used in the insuring section to refer to the exclusions. In the “PERSONAL LIABILITY-INSURING AGREEMENT” subsection, the policy undertakes to:

1. Pay on your behalf claims for which you or any *covered person* are legally liable . . . up to our limit of liability; except as excluded by the provisions listed in the **Liability Coverage – Losses We Do Not Cover**; . . .

The reference to the exclusions section as “Liability Coverage – Losses We Do Not Cover,” reinforces that under the policy structure the reference is to a specific area of the policy, and that that area is different and distinct from “Liability Coverage – Personal Liability,” one of the three areas referred to in the amendment to the General Provisions.

ambiguous in this regard, and must be construed against the defendant and in favor of the Trautners, the insureds.⁴ *Fire Ins Exchange, supra* at 687; *Twichel, supra* at 488.

III

Plaintiffs assert that the circuit court erred in denying their motion to amend in the garnishment proceeding to add claims of bad faith.

This Court reviews the circuit court's denial of plaintiffs' motion to amend for an abuse of discretion. *Backus v Kauffman*, 238 Mich App 402, 405; 605 NW2d 690 (1999). A court should freely grant leave to amend a pleading if justice so requires. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). However, leave to amend a complaint may be denied for particularized reasons, including where amendment would be futile. *Id.*

Plaintiffs brought this action as a garnishment proceeding, as creditors of the Trautners seeking to recover amounts owed to the Trautners under the policy of insurance. Plaintiffs did not purport to be bringing the action as assignees or subrogees of the Trautners. Under the circumstances, the court did not err in denying the motion to amend to bring a claim for bad faith. *Lisiewski v Countrywide Ins Co*, 75 Mich App 631; 255 NW2d 714 (1977).

Affirmed in part, and reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens

⁴ We note that in many cases the additional insured will not be a family member, but will be a mortgage lender or a land contract vendor. If a homeowner is buying property pursuant to a land contract that provides that the vendor can inspect quarterly, and the vendor comes to inspect and is injured, the homeowner might legitimately expect to be covered for liability, provided such coverage is not expressly excluded.